

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 277.

THE ERIE & WESTERN TRANS-
PORTATION COMPANY, et al.

Petitioners.

vs.

THE UNION STEAMBOAT COM-
PANY, Claimant of the Propeller
"New York."

Respondent in Certiorari.

Certiorari to the U. S. Court
of Appeals for the Sixth
Circuit.

BRIEF OF PROCTORS FOR RESPONDENT.

The petition in this case does not state the facts of the collision as they were presented to the District and Circuit Court of Appeals. The case is now presented in a different form, both as to the law and in some respects as to the facts, and we, therefore, take the liberty of making a concise and brief statement of facts in our brief before we proceed with matter in argument.

STATEMENT OF CASE.

Case of collision on October 21, 1891, in Detroit River, just below the City of Detroit, between petitioners' steamer Conemaugh and respondent's steamer New York.

Conemaugh's length, 250 feet; beam, 35 feet; depth, 15.3.

New York's length, 270 feet; beam, 37 feet; depth, 16.2.

Width of river at locality of collision between channel banks, about 2,300 feet; between shore lines, about 2,800 feet.

Current of river, about $2\frac{1}{2}$ miles per hour; weather clear; starlight, no moon; slightly hazy, as is usual at that time and season.

A little below, directly opposite the place of collision, is located a coal station, known as "Smith's Coal Dock," where vessels are accustomed to procure their supplies of coal.

These coal docks are about two miles below Fort Wayne, the lower city limit.

On the evening in question, before and at the time of the collision, as referred to in the libel, answer and testimony, the steamer Burlington, with a tow of four lumber-laden barges, bound down, was "rounding to" in the river to take coal at "Smith's dock."

This steamer and tow was in the order and of length as follows:

Burlington	Length	145	feet.
Tow line	"	600	"
1, Barge Wesley	"	150	"
Tow line	"	500	"
2, Barge Republic	"	148	"
Tow line	"	500	"
3, Barge Amaranth	"	148	"
Tow line	"	500	"
4, Barge Ferguson	"	135	"
<hr/>			
2,826 feet.			

The Burlington and her tow was, in length, about the width of the river from shore to shore; and in running down preparatory to "rounding to" she had taken her tow well over towards the Canadian shore, estimated by her

captain as three-quarters across from the American shore.

The speed of the Burlington and tow while "rounding to" was at the rate of about four miles an hour, including two and a half mile current of the river; this makes the speed of the two rear barges a little greater than the current or about three miles.

The steamer Conemaugh, owned by petitioner, bound down, on a voyage from Milwaukee, Wis., to Erie, Pa., and the New York, owned by appellant, bound up, on a voyage from Buffalo, N. Y., to Milwaukee, Wis., came into collision about 8 o'clock p. m. on said 21st of October, 1891, near the Canadian bank, and, as stated, a little above directly opposite the "Smith coal docks," by which the Conemaugh was sunk; the Erie & Western Transportation Co., her owner, filed its libel against the New York for the sum of \$70,000 as her damages on account of the collision.

The libel alleges: "Third." "On the American side of the Detroit River, a little below the River Rouge, was and is a coal dock known as "Smith's Coal Dock." Between 7 and 8 o'clock p. m. of said day, the weather then being clear and fine, the Conemaugh was proceeding down the Detroit River to the American side of mid-channel, having hauled some to starboard to avoid some piles (Kasota) driven in the channel, and when a half or three-quarters of a mile above the said coal dock she received a signal of two blasts from a steamer which, with four barges in tow, had theretofore been going down the Canadian side of the river, and was then rounding in and up to and was near the said coal dock, exhibiting her mast head and green lights to the Conemaugh."

"The Conemaugh's engine was at once checked, and remained checked until after the time of the collision hereinafter stated, her helm starboarded, and she answered

with two blasts, and hauled out sharply, keeping some distance above the tow and so directing her course as to pass astern and to the Canadian side of the said tow, which was 'rounding to' and which then stretched out in the river towards the Canadian side.

"The Conemaugh then made the lights of a steamer, which proved to be the said propeller New York, then down the river below the said tow, and coming up so heading towards the Conemaugh and on such a course that the Conemaugh as she was preceding, would cross the New York's course before the New York could reach the point of intersection of the two courses.

"The Conemaugh at once blew to her a signal of two loud and distinct blasts of her whistle. Not receiving a reply thereto, the Conemaugh promptly repeated the signal of two blasts. To this second signal the New York did not reply, and again the Conemaugh blew a two-blast signal; when the New York, which had all the time been coming rapidly up the river, still without replying to any of the Conemaugh's signals, turned suddenly and rapidly to starboard, swinging over towards the Canadian shore; whereupon the Conemaugh blew alarm whistles and hard-starboarded her helm.

"Notwithstanding there was ample room, had the New York properly approached and had she been properly handled, for the Conemaugh and the New York to have safely passed each other and the tow in accordance with the signals of the Conemaugh, the New York first swinging rapidly and violently to starboard and apparently turning some to port just before she struck, came on at full speed and with her stem struck the Conemaugh with tremendous force on the starboard side, abreast the Texas, and almost immediately the Conemaugh struck the Canadian bank of the river and filled and sank."

The New York was seized under process issued upon said libel and bonded in the sum of \$70,000 by the Union Steamboat Company as claimant.

The answer filed to this libel states:

"That on the said day (October 21), between the hours of seven and eight o'clock p. m., a collision occurred between the propellers New York and Conemaugh, in the Detroit River, below the Town of Sandwich, on the Canadian side of the river. That before and at the time of the said collision the propeller New York was bound up said river, and when nearing a point in said river below where the River Rouge empties into the Detroit River, a steamer with a tow of four barges astern of her, began to round from the Canadian side of the river to the American side, as though bound to a place known as Smith's Coal Dock, exhibiting to the New York her masthead and red side light, as well as the red side lights of the barges in tow as they came around.

"To this the New York blew a passing signal of one blast, at the same time checking her engine and reducing her speed to about four miles an hour, and then porting her helm so as to pass under the stern of the last barge.

"When the New York had arrived at a point abreast of the last barge in tow a signal of two whistles was heard, but being unable to see any vessels, and noticing only a white light close on the Canadian bank of the river, the signal of two blasts was not answered, as it seemed to be intended for some other vessel, the New York being then close to the Canadian bank, and there not being room enough for any vessel to pass safely between her and that bank.

"The New York, therefore, still running slowly, continued on her course so as to go around close to the last barge, and when abreast of her quarter starboarded so as to go close under her stern. While passing under the

stern of this barge and not more than 10 or 20 feet from her, several short blasts of the whistle of the propeller, which proved to be the Conemaugh, were heard close at hand and not more than 100 feet away.

"The Conemaugh pursued her course directly across the bows of the New York, which was then swinging under a hard-a-starboard helm.

"A collision was then inevitable, and there was neither time nor room enough to stop the engine of the New York, and the only way left open to avoid a collision was to continue under headway and swing clear under a hard-a-starboard helm. This was done. Notwithstanding this, the Conemaugh, with considerable headway, continued on her course across the bows of the New York, so that the latter struck her, stem on, on the starboard side, abreast of her forward gangway, and glancing along this side, was swung by the Conemaugh nearly alongside.

"That at the time the New York passed under the stern of the barge she was not more than the length of herself from the Canadian bank; that no other passing signal was heard from any steamer after the exchange of the signal of one blast with the steamer having the tow, except the signal of two short blasts from the Conemaugh, and that when this was received the New York was close alongside of the last barge heading for the Canadian bank of the river, in a position and on a course that no steamer could with safety pass her starboard side to starboard side, and if such a maneuver was attempted a collision could best be avoided by swinging clear under a hard-a-starboard helm."

On February 24, 1892, by leave of Court, the Union Steamboat Company filed its cross-libel against the Conemaugh.

The case was tried in both courts upon proof made by libellants, as the respondents called no witnesses and offered no proof.

BRIEF.

It is not disputed in this case that the Conemaugh and New York were under steam; were crossing so as to involve the risk of collision; and that the Conemaugh had the New York on her own starboard side.

This is the allegation of the libel, and the effect of all the testimony.

Record, 2.

The petitioners' counsel assumes that as this collision took place on the Canadian side of mid-stream of the Detroit River, the laws of Canada must govern this case, or in lieu of being successful in that claim; then the rule of law to follow shall be that known as international rules and regulations as prescribed by Act of Congress of 1885; while both the District Court and the Circuit Court of Appeals were governed by the Revised Statutes of the United States, Sec. 4233, and rules of the Supervising Inspectors.

This last mentioned law, Sec. 4233, is guided in its application by *Inspectors' rules not favorable to petitioners*, while the other mentioned laws are not so guided.

The general rule of navigation of all these is:

"If two vessels under steam are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side, shall keep out of the way of the other."

U. S. R. S., Sec. 4233, Rule 19, p. 823.

U. S. Stat. at Large, 441, Act Mar. 3, 1885, Art. 16.

R. S. of Canada (Exhibit Record, 259, 262 act 16).

It is clear, therefore, that, in this case, whichever of these rules shall be found to have been the governing rules at that time, it was the duty of the Conemaugh to keep out of the way of the New York. And it was the correlative duty of the New York to keep her course and speed.

It is most essential that, before this court shall attempt to consider this case upon its merits, which law or code of rules governed the navigation of the boats at the time of the collision shall be definitely ascertained.

As aid to the Court, counsel for the New York have prepared and do present a chart of the collision, carefully and as accurately as possible prepared from the testimony, upon a scale of 100 feet to one inch. The testimony used was solely that of petitioners' witnesses, there having been no witnesses called by the New York in this case. (This chart shows all the vessels at all times during the run from their first position *at which they appear brown in color*. This general chart is No. 1, the individual chart of this position being No. 2.)

This chart was constructed by locating the Conemaugh abreast of the Kasota spiles, 250 feet inside, where her master locates her, when he received and answered the signal from the Burlington. By locating the Burlington by the testimony when she signalled the Conemaugh, and her four tow barges with tow lines stretched to scale lengths, and in such position as the witnesses described. The New York was located (first having exchanged signals of one whistle with the Burlington) where the master of the Conemaugh places her.

These boats all appear on the chart as *brown in color*, and starting at these positions with the speeds of each; the Conemaugh from $9\frac{1}{2}$ to 10 miles, diminishing to about 4 to 5; the New York 8 to 10 miles maintained; the Bur-

lington and tow about 2 miles speed; and the current of the river $2\frac{1}{2}$ miles, they proceed on their proper courses until they reach the relative positions shown on the general chart as black and white line. (Separate Chart No. 3.)

The Conemaugh, upon exchanging a signal of two whistles with the Burlington, put her helm hard-a-starboard and swung across the river, (See Chart No. 3), until she picked up the stern barge of the tow, when her master gave the order "Steady," then "Port a little and follow that tow up" (pp. 112, 115), under which she swung to starboard (See Chart No. 3), and while so doing saw the lights of the New York and gave her a blast of two whistles.

The Conemaugh continued swinging under her ported helm, following the tow down with the current and her own speed, directly in line with the barges, who, on account of the current, were swung into the course of the New York, so that she was compelled to port a little and swing slightly to starboard in order to clear them. (Record, 87, 93, 98.) (See Chart No. 4.)

The tracks of all the vessels up to this position and just as the New York was about porting to make this slight change, appears on general chart colored blue. (Individual Chart No. 4.)

From this position the Conemaugh continued swinging under her "port helm to follow the tow around," until she exhibited to the two stern barges both her side lights (Rec., 89, 97, 106), on which course she steadied and continued exhibiting both those lights, until she starboarded and sheered towards Canada and across the course of the New York (Rec., 39-40, 87, 148), which was after the New York had steadied to run down parallel with and clear of the courses of the two rear barges and from 50 to 75 feet away from them and about abreast the stern barge. (Rec., 95-98.)

This position of the boats, and the courses run until the sheer to port under the starboard helm of the Conemaugh, caused the collision, appears on this chart as colored red. (Individual Chart No. 5.)

It was at about this time when the Conemaugh blew the alarm whistle (Rec., 18), starboarded her helm and ran to cross the bow of the New York. She blew the alarm when just astern of the rear barge. (Rec., p. 102.)

The New York continued about on a parallel course with the two rear barges, from 50 to 100 feet away from them (Rec., 87, 89, 98, 102, 158), until just as she reached the stern barge, when she heard two blasts of a whistle from off her port hand, but seeing no vessel in that direction from which such whistles could have come, paid no attention to them. Almost instantly though she heard the alarm of the Conemaugh and saw her swinging across the New York's bow under starboard helm; the New York had already starboarded to pass under the stern of the rear barge, and while swinging under a starboard helm, struck the Conemaugh crossing her bow. (Rec., 19, 58, 141, and answer.

The collision took place just astern of the last barge (Rec., 102, 119, 133), and about 300 feet from her (Rec., 87-88, 89, 141-142, 148-149). This condition is shown by individual chart No. 6, colored white.

We present with this brief, on a smaller scale, a copy of these charts.

Counsel for petitioners asks as the first important question presented in this case:

1. "Do the laws of the United States and rules of navigation prescribed by the Supervising Inspectors have any

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extra territorial effect; and do they apply in cases of collision between American vessels when navigating the waters of the Dominion of Canada, and beyond the territorial limits of the United States?"

Both the Conemaugh and the New York were American vessels. When they sighted each other both were navigating in Detroit River on the American side of said stream.

The New York was compelled to take the Canada side by the presence of the Burlington and tow, and her obligation to keep her course and speed as to the Conemaugh; the Conemaugh sought the same side only because of her desire to avoid delay. She had put her starboard side to the New York, whose port side light she saw; "they were on crossing courses involving risk of collision;" the Conemaugh was bound to keep out of the way; the New York must maintain her course and speed.

The Conemaugh had blown two whistles twice to the New York while on the American side of said stream.

Capt. Conemaugh, Record, 17-35.

Hence the maneuvering of these vessels to pass, really commenced when both were in American waters, at a time (which counsel cannot deny) when the R. S., Sec. 4233, and Supervising Inspectors' Rules, furnished the rule of the road for them to obey.

These rules having attached to said steamers, continued to be obligatory up to the time the Conemaugh blew the alarm signal, and starboarded across the bow of the New York, when both were thereby put in extremis.

N. Y. L. & U. S. Mail S. S. Co. vs. Ramball, 21 How., 372-384

The Johnston, 9 Wall., 146-153.

The Wenona, 19 Wall., 41, 52.

The Breakwater, 155 U. S., 252, 264.

In all probability neither master knew anything of the law of Canada; neither exhibited any knowledge of it.

The libel does not mention the law of Canada; it was not referred to during the trial of the cause, nor in the first decision (53 Fed. R., 553) of District Judge Swan, by which he held both steamers at fault. The District Judge, in referring to the Supervising Inspectors, says: While Rule 19 is absolute, that the steamer having on her starboard hand another, whose course she is crossing, must keep out of the latter's way, it does not define the course to be pursued to effect that end. To diminish still further the risk between steamers thus approaching, the supervising inspectors, under congressional authority, adopted Rule 2 of the Pilot Rules for the lakes and seaboard, prescribing that such steamers "shall pass to the right of each other as if meeting head to head or nearly so, and the signals by whistle shall be given and answered promptly as in that case specified." In the conditions to which it applies, this rule is to be read into Rule 19 of the Steering and Sailing Rules (Rev. St. U. S., par. 4233). Yet, as declared by the inspectors themselves, it is not a rigid and invariable regulation, but is "to be complied with in all cases, except when steamers are navigating a crowded channel, or in the vicinity of wharves." As it does not absolutely impose on the steamer having another on her starboard hand, the duty of porting under all circumstances, it is not inconsistent with the steering and sailing rules. These steamers were navigating in a crowded channel, and that fact exempts the Conemaugh from the obligation to port under Pilot Rule 2.

Petitioners, evidently, to be freed from the burden of explaining the violation by the Conemaugh of inspectors' rule, referred to in the opinion of the District Judge above quoted from, made a petition for a rehearing, claiming the collision should be governed by the Act of 1885

(Vol. 23 of Statute, Chap. 356), which, like the Canada rule, does not require the burdened steamer to port in keeping out of the preferred steamer's way.

The trial of this case in the District Court was concluded March 2, 1892, and up to November 3, 1892, nothing had been said about the Canadian Statute. Counsel in his affidavit says, "On that date it was introduced into the case," with a motion for rehearing (Rec., 254), and in the second opinion of the District Judge, filed May 16, 1895, the Canadian law is not referred to.

I submit, therefore, that questions 1 and 2 are not pertinent here, as this collision had its inception within American waters, and although the vessels ran across the line before colliding the rule at inception on the American side of that line continued to the end of the maneuvering.

2. The next question presented by petitioners' counsel is, "Was this case governed by the act of March 3, 1885?" Counsel's endeavor here, is again to secure the elimination of inspectors' rule which was violated by the Conemaugh.

The act of 1885, referred to, locates the waters in which it shall be the rule of navigation "*as upon the high seas and in all coast waters of the United States,*" and excepts its application to *vessels navigating within the harbors, lakes and inland waters of the United States.*

This act evidently was intended to apply only to salt sea or ocean navigation, and the exceptions clearly exclude from it the Great Lakes. Had Congress intended its application to the Great Lakes and connecting waters, common reasoning would lead us to suppose that the Act of February 8, 1895, would not have been passed.

The Court of Appeals had this question before it in the *North Star*, 62 Fed., 73, and took the same view, holding to the R. S., Sec. 4233.

Such was the rule governing the navigation of the waters of the Sixth Circuit at the time of this collision.

The *North Star*, 62 Fed. R., 73.

The answer to this question therefore must be: The Act of 1885 did not supersede Sec. 4233 of the Revised Statutes and Rules of Supervising Inspectors.

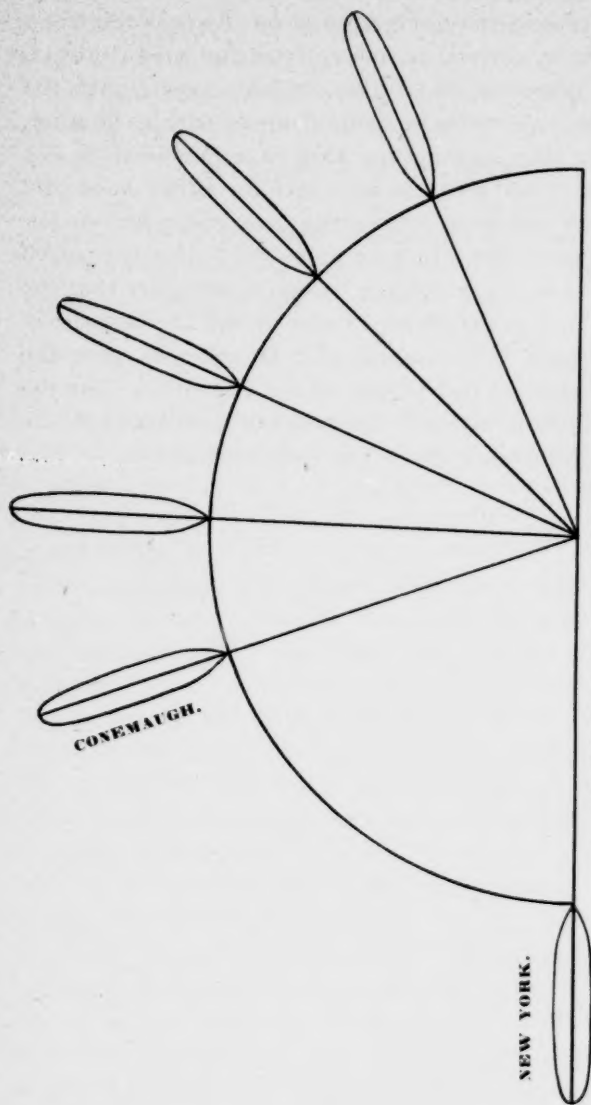
3. Petitioners' next question (Brief III), "Has the Circuit Court of Appeals in this case properly construed Inspectors' Rule No. II.?" "As already stated, that Court held, that under this rule it was the duty of the *Conemaugh* to port and go under the stern of the *New York*."

Counsel cites the rule, "When steamers are approaching each other in an *oblique* direction, as shown in the fourth situation put forth," etc.; and contends that the word "oblique" is not *synonymous* with the word "*crossing*" as used in Rule 19, Sec. 4233, Revised Statutes.

"If two vessels are *crossing* each other so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other."

At page 14 of his brief, counsel declares, with reference to this collision, "The *New York* and *Conemaugh* were on crossing courses so as to involve risk of collision," his contention being that the *New York* and *Conemaugh* were not *approaching* each other as indicated in the diagram; they were on *crossing* courses, the *Conemaugh* going down the river and the *New York* going up the river." Counsel's position is not sound. It isn't a question where the vessels were going. The material inquiry is, How

were they going, relatively, to each other? There are but two positions in the navigation of two vessels relatively to each other, covered by the rules of the road (Rule 18, Rule 19). One when on parallel courses to each other, the other when on *crossing* or *oblique* courses with each other, and when they are approaching *so as there shall be risk of collision*; they must be approaching either head and head on, or one must necessarily have the other on her own starboard side. In both cases the helms are ported to pass, unless circumstances render it necessary that the preferred one, under Rules 19 and 23 and the Inspectors' Rule II., may, if necessary, port in order to give the burdened steamer more room for her maneuver. The following diagram explains the possible positions of the vessels approaching under the fourth situation.



INSPECTOR'S RULE II. DIAGRAM. FOURTH SITUATION.

If not *approaching* on *parallel* courses they are within situation IV.

The objection of counsel to the validity of Inspectors' Rule as against Rules 19 and 23, Sec. 4233, has been answered in the following cases, affirming the validity of the rule, and in no case sustaining counsel's position:

The Johnson, 9 Wall., 146, 153.
 The Grand Republic, 16 Fed. Rep., 427.
 The B. B. Saunders, 25 Fed., 727 (731).
 U. S. vs. Miller, 26 Fed., 97-98.
 The John King, 49 Fed., 400.
 The E. A. Packer, 58 Fed., 251.
 The George S. Schultz, 84 Fed., 508.

The common law rule of the road at sea, before rules of navigation were provided by legislation, was the port helm or right hand rule, that the burdened vessel of two vessels meeting on crossing courses should port her helm and pass astern of the privileged vessel.

This rule was adopted by the law-making power, and has been the rule ever since, and is the rule to-day, whether declared by Inspectors' Rules or not.

The Rhond, 8 App. Cas., 549, 555.
 The Columbia, 10 Wall., 246.
 The Britannia, 153 U. S., 138.
 The Delaware, 161 U. S., 459.

The language of the Supreme Court in the case of the Delaware, 469, contemplates such to be the rule of the road by this forcible language:

"The cases of the Britannia, 153, U. S., 130, The Northfield, 154, U. S., 629, must be regarded, however, as settling the law, that the preferred steamer will not be held in fault for maintaining her course and speed, so long as it is possible for the other to avoid her *by porting*."

Therefore the answer to this question must be, The Circuit Court of Appeals has properly construed Inspectors' Rule 2.

4. The question now is as to the duty of the New York to answer the Conemaugh's signal of two blasts.

The two steamers were approaching on crossing courses so as to involve risk of collision, and there was a demand for maneuvering in accordance with the rules of the road; it is conceded that their relative movements were such that it was the duty of the Conemaugh to keep out of the way of the New York, and correlatively the duty of the New York to keep her course and speed, subject to the qualifications of Rule 24, Revised Stat., 4233. While in that position and at the distance of about three-quarters of a mile apart, the New York having already entered into a passing agreement with the Burlington and her tow; it being in the night, the Conemaugh, in violation of her duty under the Inspectors' Rule, signalled the New York that she should cross her bow, and repeated that signal twice. It being the New York's duty, first, to keep her obligation with the Burlington, which demanded of her possibly a port helm, while the demand of the Conemaugh was from her a starboard helm. The Inspectors' Rule duty of the Conemaugh to port and pass under her stern, if obeyed, made navigation between the two steamers safe and simple; the Conemaugh had but to port her helm, run up into the bight made by the line of the Burlington and her tow, and check down but a moment until the New York got by her; the New York had but to keep clear of the tow, maintain her course and speed. The Conemaugh did in fact "port and follow the tow round," until she exhibited to the New York and to the barges in the tow both

her lights, while at the same time she was deceiving the New York by blowing her two-whistle blasts.

Testimony of Capt. of Barge Amaranth.

Testimony of Capt. of Barge Ferguson.

Had the New York replied to the whistles of the Conemaugh by one blast of her whistle, she would have violated Inspectors' Rule III. (see Circular, Petitioners' Brief, page 15) by giving a cross signal; if she had replied by two blasts of her whistle she would have assented to a violation of the rule which required her to keep her course, and which assent she was under no obligation to give, but, on the contrary, prohibited by rule from giving.

Under the authorities she did right in ignoring the proposition of the Conemaugh.

The Delaware, 161 U. S., 467.

The Geo. S. Schultz, 84 Fed. R., 508.

The John A. King, 49 Fed. R., 469 (472).

The Florence, 61 Fed. R., 949.

The B. B. Saunders, 25 Fed. R., 731 (Wallace, J.)

But her act in refusing to accept the proposition was in law equivalent to a refusal, and the only legal way of declaring that refusal. The testimony of Capt. Miller of the Conemaugh shows that the refusal in no way contributed to any movements of the Conemaugh, or in any way interfered with his management of her.

See testimony.

Capt. Miller of the Conemaugh testifies as follows, after his statement of the exchange of two whistles with the Burlington, starboarding his helm, and running across the river:

35.

CROSS-EXAMINATION.

Q. Well, now, captain, I understand, about the time you steadied, you made the port light and masthead light of what proved to be the New York?

A. Yes, sir.

Q. How were you heading at that time with reference to the stream?

A. At right angles, or a trifle up stream.

Q. Your starboard light then ought to have been visible to the New York?

A. Yes, sir.

Q. And you blew two whistles?

A. Yes, sir, and continued to run across the river.

Q. And soon you opened her starboard light?

A. Yes, sir, at the time I blew the second blast of two whistles.

Q. She seemed about the middle of the stream?

A. A little on the American side of it.

36.

Q. When you gave her two whistles, what did you expect from her?

A. That we would pass starboard to starboard.

Q. What did you expect from the New York?

A. Expected her to pass on her starboard hand, and I would pass on his starboard hand.

Q. Did you expect him to starboard his helm?

A. No, sir.

Q. Did you expect him to port his helm?

A. No, sir.

Q. Did you expect him to check his boat?

A. I didn't.

Q. Or stop his boat?

A. No, sir.

Q. But you expected him to keep along on that course with the speed he was then holding?

A. Yes, sir.

Q. You didn't expect anything else from him?

A. No, sir.

Q. You knew that was his right?

A. Yes, sir.

Q. You knew it was your duty to keep out of his way?

A. Yes, sir.

Q. Did it occur to you, I will ask you again, at that time when you were considering the rights of the New York and your own obligation, what was to be done with this string of three barges which was between you and the New York?

A. *I had got done with them, I had found the tail end of them.*

37.

Q. You didn't get any reply to those two whistles?

A. No, sir.

Q. How long did you wait before you repeated them?

A. Not a great while.

Q. You had got on a course that would certainly clear you, so far as the stern barges were concerned?

A. Yes, sir.

Q. So any anxiety you might have had was disposed of when you had accomplished that? Any anxiety you may have had with reference to the tow you had gotten rid of by getting your boat around so that you would steer clear of her?

A. Yes, sir.

Q. When you blew the New York that signal of two blasts, your mind was perfectly easy?

A. *Just before I blew it, no.*

Q. *Blowing it did not disturb you?*

A. *I had to get out of his road then.*

Q. *He was a mile away?*

A. *At that time he was not showing only his red light.*

Q. Did that induce you to repeat your signal any quicker than you would if he had been showing you both his lights?

A. Yes, sir.

Q. Then you hadn't waited as long as you usually wait?

A. No, I think not.

Q. And you repeated that signal of two blasts to him about that time he showed you both his lights?

A. Yes, at that time I got a glimpse of both.

Q. Did he open it, or did you open it?

38. |

A. It appeared I was opening it.

Q. You think you were opening it?

A. Yes, sir.

Q. *Did the failure of the New York to answer your first two blasts cause you to make any change in the course of your vessel?*

A. No, sir.

Q. *Nor in the speed of your vessel?*

A. No, sir.

Q. *Nor in the condition of her helm. You didn't make any change on account of his failure to answer your first two whistles.*

A. No, sir.

Q. *And you blew him another two about the time you opened the starboard light?*

A. Yes, sir.

Q. *Standing on the same course across the river?*

A. *I think by this time we had started to follow the tow back again.*

Q. *Had you steadied?*

A. *Steadied, and after they steadied, followed the tow back again.*

The Court:

Q. *You had ported when you sounded the second signal of two blasts?*

A. Yes, sir, we swung the port wheel slow.

Q. When did you give that order to port?

A. Soon after steadying, when I found we were heading up the river above the tow, then I sung out, "Steady, follow them back so as to keep that distance off."

Q. With reference to blowing the first two blasts, when was the helm ported?

A. It was about that time.

Q. Then when, in fact, you were in that condition, seeing the port and masthead light of the propeller New York, and realizing your duty to get across his bow, get out of his way, you ported your helm, instead of keeping on and getting out of his way? Is that what you mean to say now?

A. Then I was swinging slowly under a port helm.

Q. When you opened his starboard light, you knew how he was heading, didn't you?

A. Yes, sir.

Q. And you blew him two whistles again?

A. Yes, sir.

Q. And he didn't answer?

A. No, sir.

Q. Did you change your helm, your speed, or your attention in any way?

A. No, sir.

39.

Q. Then his failure to answer you didn't make any difference with the navigation of your boat?

A. No, sir.

Q. You stood on about the same length of time, I suppose, then you repeated your signal?

A. Somewhere about the same.

Q. Making the third signal?

A. Yes, sir.

Q. Hadn't you got clear of the barges by that time?

A. No, sir.

Q. Where were you when you repeated your signal for the second time, which would be the third signal?

A. *We were pretty near abreast of the tail of the tow.*

Q. Where was the New York?

A. *I could see the New York then; he appeared to be in here between the second and third barges from the end.*

Q. You hadn't crossed his lines yet?

A. *I had both lights open.*

Q. *But you hadn't crossed his bow when you blew the third signal to him?*

A. *No, I think not.*

Q. *He didn't answer that?*

A. *No, sir.*

Q. He kept coming right along?

A. *Yes, sir.*

Q. *Seemed to be pretty close to the tow, didn't he?*

A. *He appeared to be.*

Q. *And his failure to answer your whistle made no difference in the navigation of your boat?*

A. *It was right about this time, somewhere between the third signal and the alarm signal, when I sung out, "Hard-a-starboard, steady; then hard-a-starboard."*

Q. *I am just now navigating with you on the Cone-maugh, having twice had my signals of two whistles ignored; blowing a third signal to the New York, at which time you haven't yet passed the stern barge in the tow, and the New York seemed to be between the second and third barges, holding pretty close to them?*

A. *Yes, sir.*

Q. *She didn't answer that signal?*

A. *No, sir.*

Q. *You didn't change your course then?*

A. *I think it was about that time we steadied.*

Q. *About that time you starboarded?*

A. *I said steadied.*

Q. *Steadied from a port helm?*

40.

A. *Yes, sir.*

Q. *About the time he failed to respond to your third signal you stopped swinging under your port helm?*

A. *Yes, sir.*

Q. *He was then showing you both his side lights?*

A. *Yes, sir.*

Q. *And you hadn't reached the course of the stern barge?*

A. *Coming on to it, then, about that time.*

Q. *Now, captain, if you hadn't steadied from the port helm, you think you would have swung down on the port side of the New York?*

A. *Yes, sir.*

Q. *Did you steady?*

A. *Yes, sir.*

Q. *Did your vessel stop her swing?*

A. *I believe so.*

Q. *And then you blew him a fourth signal of two whistles?*

A. *No, sir, that was an alarm whistle, several short blasts.*

This is demonstrative proof that, had the Conemaugh obeyed the rule by porting and going down the port side of the New York, there would have been no collision.

5. As to the duty of the New York to maintain a sufficient lookout.

The answer in this case denies the allegation of the libel that the New York did not maintain a sufficient lookout.

That allegation, it was the Conemaugh's duty to establish by testimony, as upon her was the burden of proof,

having admittedly been guilty of violations of the rules of navigation sufficient to account for the collision.

The City of New York, 147 U. S., 72 (35).

The Carroll, 8 Wall., 303-304.

The Columbia, 10 Wall., 246.

The Victory, 18 S. C. R., 149.

By the libellant's proof, when the New York was signalled by the Burlington, she replied instantly to the Burlington's passing signal and took her proper course in accordance therewith. This is some evidence of a sufficient lookout and contradicts the allegation.

The charge made is based upon inference, and petitioner asks the Court, notwithstanding the implication that the New York did her duty, and that the burden is upon him to sustain his charge, to imply this from the fact that she did not reply to his passing signals.

When we consider, as will appear from the testimony, that the Conemaugh's navigation in "porting and following the tow down" was such as to show to the New York her red light, it isn't surprising that in the darkness of the night the New York should have taken the Conemaugh, or the vessel carrying the rear red light, and in the relative situation with the tow which she was, for one of the tow.

Under such circumstances the New York performed her duty and the presumption that she had a lookout is in her favor rather than in the self-convicted steamer Conemaugh.

6. "As to the right of a steamer bound to hold her course, to deviate therefrom because of the intervention of another moving vessel."

When the New York had entered into the agreement with the Burlington to pass her tow under a port helm, and had ported and taken the proper course toward the

Canadian shore, to enable her to perform that maneuver, the Conemaugh had not yet appeared; the Burlington with her tow was swinging across the river, rounding to at the coal dock, to which she was nearly opposite.

It was in the night time, and the New York and rear barges of the tow were something more than a mile apart; the New York had only the lights of the tow to guide her in keeping clear of the barges on the one side, and on the other she saw that she must approach unusually close to the Canadian shore, so that she shifted her course just sufficiently to starboard, as the condition of things then were, to enable her to pass the barges and at the same time safely keep clear of the Canadian bank. Counsel cites the Lake St. Clair Canal as evidence that there was ample room. The canal has a pier on each side, and every master knows he may go to the pier. The Canadian bank has no such guide, and at night the shore line is invisible. She could not then see that the barges would maintain their courses under the force of the current and the weight of their tow lines before being brought up and taken across to the American shore. As she approached, however, seeing by the barges' lights that they had pulled on to her course, she ported her helm and deviated to starboard, a space of from 50 to 100 feet, just sufficient to enable her to run down alongside of the barges that distance away from them. Had she not taken this precaution she would not have cleared the two rear barges. There was nothing, so far as she could tell, but the barges ahead of her; if the Conemaugh was ahead she could not be known or recognized, as she was showing to the New York her red light.

See testimony of Captains of Amaranth and Ferguson.

At this time the Conemaugh was maneuvering under the order to her wheelsman, "Port and follow the tow

around," and was exhibiting to the stern barges both her side lights.

Dominick Jeans, Captain Amaranth, p. 87, testified:

I watched him closely and I saw his green and red light and masthead light along, until he came to sheer on the Canada side, then I lost his red light and saw his green light.

Loomis, P. Smith, Captain Ferguson, p. 97, testifies:

After he went across the river and ported his wheel, I followed him along down the river, he ported so he showed me just a glimmer of his red light before he starboarded again.

Q. A glimmer of his red light, and what other light did you see?

A. His green light and masthead light.

P. 103:

Q. What lights on her (Conemaugh) did you see at the time she blew the whistles to the Burlington?

A. I saw his red and masthead light, his port light and the masthead lights.

Q. And then what next did you see?

A. His green light.

Q. You did not see both of the Conemaugh's lights at any time?

A. Yes, sir, right after the signal, I saw the three of his lights.

Q. How far was she above you in the river at that time?

A. About a quarter of a mile, I should judge, up the river.

P. 106:

Q. The Conemaugh then was virtually following you, keeping astern of you and following you around?

A. She appeared to be.

Q. And in that way it was you got the glimmer of her red light, in addition to her green light?

A. Yes, sir.

The New York had not yet learned of the presence of the Conemaugh, she had heard her signal; she had seen an exhibition of both her side lights, undoubtedly assuming them to be only the tow barges; being guided by the provisions of the rules of the road, she had no reason to expect the presence of the Conemaugh or any other than one of the tow in the position she was.

Counsel's position now is that the presence of the tow did not present such an obstruction as is contemplated by the rule laid down in

John L. Hasbrook, 93 U. S., 405.

and the other cases referred to by the Court of Appeals, in its opinion. Counsel's contention is that the New York, seeing the barges pull on to her course, should have stopped and waited until they got out of her way.

The New York had only for her guide the red lights of the barges, her only safe act was to keep those red lights over her port bow. The Conemaugh claims to have had a clear view of the New York, also of the barges in tow, therefore she saw the difficulty ahead of the New York and knew full well the New York's change of course it was her duty to make (under Rule 24) in order to clear those barges. A glance at the chart will show that the Conemaugh was in no way interfered with by that change. The master of the Conemaugh testified that he was in no way affected by it.

Capt. Miller, of the Conemaugh, testifies:

P. 187:

Q. You had blown her three sets of two whistles?

A. Yes, sir.

Q. Which indicated you were crossing her course?

A. Yes, sir.

Q. *And she had not replied to you at all?*

A. No.

Q. *Why didn't you go down on the port side of her when you saw the boats in that position?*

A. *Having signified my intention, I concluded it was my best policy to hang on to the course I was on.*

Q. You were bound to keep your course, were you?

A. I would have crossed his course if he had kept on as he was at the time of blowing those whistles.

P. 188:

Q. What change of course did the New York make that was not necessary for her to make to come by those barges?

A. I don't know sir. I was on my own boat at that time.

Q. You don't know that she made any change of course that was not necessary for her to make for that purpose, do you?

A. I do not.

Q. *And the only reason you can give for not porting and going down on her port side, at the time when the boats were in the position that you have placed them, is that you had blown two whistles?*

A. Yes, sir.

Q. *And you thought you must keep the course you indicated by those two whistles?*

A. Yes, sir.

Q. You knew you had the right to take either side of her, didn't you?

A. I supposed I had a right to hang on to that side of her after I had signalled my intention.

Q. *You were navigating under the theory you had the right to that side because you had whistled for that side?*

A. Yes.

Q. I want to go back a little further with the question and ask you to please state to the Court what change of course from the time you first saw the New York, until the boats were in collision, the New York made, that was not necessary to take her safely by those barges.

A. That I could not say.

Q. You don't say that she made any, do you?

A. That was not necessary to take her clear of the barges.

Q. When the boats were in that position, what did you expect the New York to do?

A. I expected him to come out here.

Q. Did you expect him to starboard and go across the stern of that barge?

A. Under the stern of the barge; yes, sir.

Q. And leave you room to go down on his starboard side?

A. Yes, sir.

Q. *You understood it was his duty to do that, did you?*

A. Yes, sir.

Q. *Because you had blown him two whistles?*

A. Yes, sir.

Q. Did you state, or do you recollect, without regard to what you have stated heretofore, that the New York seemed to have starboarded just before the collision?

A. I don't think I did, sir.

Q. Did she?

A. I couldn't say whether she did or not.

P. 189:

Q. Then you can't recollect of any change in her heading until she struck you, from the time you passed the stern of the stern barge in tow?

A. No, sir; I can not.

Q. Did you expect the New York to stop?

A. No, sir.

Q. Did you expect her to check?

A. No, sir.

Q. You knew she had no duty to stop or check?

A. Unless the captain saw fit to do so.

Q. But your whistle to him indicated no such obligation in your judgment?

A. It did not, sir.

Q. Did you expect the New York to starboard her helm before she reached the stern of the last barge in tow?

A. I expected her, certainly, sir, to pass on our starboard hand at the same time.

P. 190:

Q. You expected, when she reached the proper point, whatever it was, that she would pass on your starboard side?

A. Yes, sir.

Q. You expected that, because you had blown her two whistles?

A. Yes, sir, and when I was blowing those whistles almost across her course.

Q. You had her on your starboard side?

A. Yes, sir.

And the evidence is that the New York resumed her original relative position as soon as she could do so. She was swinging under starboard helm when she could get round the rear barge.

The rule of the road at this time compelled the New York to keep clear of the barges.

Rule 18, Rev. Stat., Sec. 4233.

Rule 19 made it her duty, subject to the qualifications of Rule 24, to maintain her course and speed.

I submit counsel's position is unreasonable and untenable.

7. Petitioners' last complaint is that the New York did not check or stop her speed.

Counsel cites the "Delaware, 161, U. S., 459," "That it will not be a fault for the preferred vessel to maintain her course and speed in the absence of some distinct indication that the other is about to fail in her duty," and he bases his contention upon the fact that, the Conemaugh, having continued to sound her two-whistle signal, amounted to a threat, which the New York should have accepted that the Conemaugh was going to attempt to cross her bow, and thus fail in her duty to port in accordance with the Inspectors' Rules.

Counsel argues that it is conceded:

First. "That the steamers were approaching on crossing courses, so as to involve risk of collision."

About this there is no question.

Second. "That each was showing to the other a single colored light. * * * * The New York at no time saw the Conemaugh's red light."

In this counsel is in error. It was unquestionably the red light of the Conemaugh that led the New York to think the last light she saw in range with the line of the tow, was upon the last barge of the tow. The proof that

she saw this red light is furnished by the testimony of the captains of the two rear barges.

DOMINICK JEANS, captain of the Amaranth, page 87, testifies:

I watched him closely, and I saw his green and red light and masthead light along, until he came to sheer on the Canada side; then I lost his red light and saw his green light.

LOOMIS P. SMITH, captain of the Ferguson, page 97, testifies:

After he went across the river and ported his wheel, I followed him along down the river. He ported so he showed me just a glimmer of his red light before he starboarded again.

Q. A glimmer of his red light; and what other light did you see?

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Q. What lights on her (Conemaugh) did you see at the time she blew the whistles to the Burlington?

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A. Yes, sir, right after the signal, I saw the three of his lights.

Q. How far was she above you in the river at that time?

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Page 106:

Q. The Conemaugh then was virtually following you, keeping astern of you and following you around?

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Q. And in that way it was you got the glimmer of her red light, in addition to her green light?

A. Yes, sir.

(See Chart No. 4.)

There is no question that in the position the Conemaugh kept while "porting and following the tow down," she exhibited both her side lights to the New York, and the New York took them as the lights of the rear barge in the tow, and was thus deceived by the failure of the Conemaugh to steer in accordance with the indication of her signals.

The Conemaugh followed in the track of the barges, until she saw the New York coming close by the stern of the rear barge, when she blew an alarm, put her helm hard-a-starboard, and swung across the New York's bow. There was almost the width of the river for her, had she ported her helm in accordance with the Inspectors' Rule; indeed, when she blew the last signal of two whistles, which was but a moment before the alarm, she was swinging under a ported helm, and, as her captain admits, had she not sheered, she would have swung clear, and there would have been no collision.

CAPTAIN MILLER testifies, page 40, as follows

Q. About the time he failed to respond to your third signal, you stopped swinging under your port helm?

A. Yes, sir.

Q. And you hadn't reached the course of the stern barge?

A. Coming on to it then, about that time.

Q. *Now, captain, if you hadn't steadied from the port helm, you think you would have swung down on the port side of the New York?*

A. Yes, sir.

Page 187:

Q. You had blown her three sets of two whistles?

A. Yes, sir.

Q. Which indicated you were crossing her course?

A. Yes, sir.

Q. And she had not replied to you at all?

A. No.

Q. *Why didn't you go down on the port side of her when you saw the boats in that position?*

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Page 188:

Q. What change of course did the New York make that was not necessary for her to make to come by those barges?

A. I don't know, sir. I was on my own boat at that time.

Q. You don't know that she made any change of course that was not necessary for her to make for that purpose, do you?

A. I do not.

Q. *And the only reason you can give for not porting and going down on her port side, at the time when the boats were in the position that you have placed them, is that you had blown two whistles?*

A. Yes, sir.

Q. And you thought you must keep the course you indicated by those two whistles?

A. Yes, sir. I supposed I had a right to hang on to that side of her after I had signalled my intention.

Q. You were navigating under the theory that you had the right to that side, because you had whistled for that side?

A. Yes.

There can be no question of this, and it is shown to a demonstration by the chart. (No. 4). Had the *Conemaugh*, after blowing her third blast of two whistles (which the Answer says was not replied to by the *New York*, because supposed to be blown for some other vessel), ported a little, or even continued on the course she was then steering, there would have been no collision. There was nothing to prevent her doing this; the law demanded it of her. In this situation there was no cause for the *New York* to check her speed. In the language of this Court, "So long as it is possible for the other (preferred steamer) to avoid her (burdened steamer) by porting, at least in the absence of some distinct indication that she is about to fail in her duty," the preferred steamer will not be held in fault for maintaining her course and speed. (The *Delaware*.)

We call the attention of the court to the language of the Court of Appeals, 2nd Circuit, in the case of *The Geo. S. Shultz*, 84 Fed., 508 (511):

"It might be surmised * * * that there will be found no inconsiderable number of masters who will never shoulder any burden of navigation which, by the rules, lay upon them, if they can force the privileged vessel to assume it, or at least to share it with them. These are the men who hold on a course which they know to be expressly forbidden by the rule, until the very last moment, hoping thus to coerce the other and the privileged vessel to yield the right of way. The dread of injury to his own vessel or to himself, his crew and passengers, will no doubt often induce the master of the privileged vessel to yield—a

timidity no doubt augmented by the many decisions which have held the privileged vessels in fault for not doing something themselves to avert the catastrophe. If, however, the master of the privileged vessel declines to be bluffed out of his right of way, the lawless navigator will usually, at the eleventh hour, conform his navigation to rule. If there be still time to save the situation, no harm is done. If the offending master has miscalculated and held on too long, and collision results, he is usually vociferous in support of the proposition (which is no doubt correct) that if the privileged vessel had only stopped or changed her course and left him free to go where he chose, no catastrophe would have ensued. This class, if it exist—and we do not doubt it does—is a standing peril to navigation. Excuse should be difficult for any master who, with full knowledge that he is the one who, under the rules, should change his course or speed or both, begins his navigation in the presence of approaching risk of collision by insisting that the other vessel shall make such changes.”

This language describes the evident spirit of the Conemaugh's master in his neglect to obey the rule of navigation, which required him to port and go down on the New York's port side.

In lieu of so doing, the Conemaugh starboarded her helm and swung across the course of the New York. Both vessels were then in extremis, and the result was the collision.

The true cause of this collision was the neglect of the master of the Conemaugh to obey the laws of navigation; to keep clear of the New York; to follow the port helm or starboard hand rule.

The New York in no way contributed to the misdeeds of the master of the Conemaugh, and not until after the

Conemaugh had starboarded and was swinging across her course, did the New York have any "distinct indication" that the Conemaugh was about to fail in her duty, and then the boats were practically in collision.

The decision of the case by the Court of Appeals was correct.

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C. E. KREMER,

Proctors for Respondent and Appellee.

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Of Counsel.